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Reference document on the crime of aggression, prepared by the Secretariat

Charter of the International Military Tribunal for the European Axis (Nürnberg Tribunal)

Article 6

...

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)

Article 5. Jurisdiction over Persons and Offences

...

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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Control Council for Germany Law No. 10

Article II

1. Each of the following acts is recognized as a crime:

(a) *Crimes against peace*: Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

General Assembly resolution 3314 (XXIX) of 14 December 1974: Definition of Aggression

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330 (XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,[1]

Deeply convinced that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. *Approves* the Definition of Aggression, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;

3. *Calls upon* all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;[2]

4. *Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

Annex
Definition of Aggression

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective

[1] *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 and corrigendum* (A/9619 and Corr.1).

[2] Resolution 2625 (XXV), annex.

collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:[3]

[3] Explanatory notes on articles 3 and 5 are to be found in paragraph 20 of the report of the Special Committee on the Question of Defining Aggression (*Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 and corrigendum* (A/9619 and Corr.1). Statements on the Definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890).

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal[4]

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

[4] Prepared by the International Law Commission, *Yearbook of the International Law Commission, 1950*, vol. II, p. 376.

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

Draft Code of Crimes against the Peace and Security of Mankind[5]

Article 16
Crime of aggression

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Commentary

(1) The characterization of aggression as a crime against the peace and security of mankind contained in article 16 of the present Code is drawn from the relevant provision of the Nürnberg Charter as interpreted and applied by the Nürnberg Tribunal. Article 16 addresses several important aspects of the crime of aggression for the purpose of individual criminal responsibility. The phrase "An individual ... shall be responsible for a crime of aggression" is used to indicate that the scope of the present article is limited to the crime of aggression for the purpose of individual criminal responsibility. Thus, the present article does not address the question of the definition of aggression by a State, which is beyond the scope of the present Code.

(2) The perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. These are the individuals whom article 16 designates as "leaders" or "organizers", an expression that was taken from the Nürnberg Charter. These terms must be understood in the broad sense, i.e. as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nürnberg Tribunal, which stated that: "Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen."[6]

(3) The mere material fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organizer. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression. In this connection, the Nürnberg Tribunal stated, in analysing the conduct of some of the accused, that: "When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.

[5] Prepared by the International Law Commission, *Yearbook ... 1996*, vol. II, Part Two, p. 42.
[6] Nürnberg Judgement, p. 55.

They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing."[7]

(4) The present article refers to "aggression committed by a State". An individual, as leader or organizer, participates in that aggression. It is this participation that article 16 defines as a crime against the peace and security of mankind. In other words, it reaffirms the criminal responsibility of the participants in a crime of aggression. Individual responsibility for such a crime is intrinsically and inextricably linked to the commission of aggression by a State. The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State. Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct. At the same time, a State is an abstract entity which is incapable of acting on its own. A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression. The Nürnberg Tribunal clearly recognized the reality of the role of States and individuals in stating that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Thus, the violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words "aggression committed by a State" clearly indicate that such a violation of the law by a State is a sine qua non condition for the possible attribution to an individual of responsibility for a crime of aggression. Nonetheless, the scope of the present article is limited to participation in a crime of aggression for the purpose of individual criminal responsibility. It therefore does not relate to the rule of international law which prohibits aggression by a State.

(5) The action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. In this regard, the competent court may have to consider two closely related issues, namely, whether the conduct of the State constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal

[7] However, the Tribunal found Schacht, Doenitz and Bormann innocent of certain charges of crimes against peace, stating that: "It is clear that Schacht was a central figure in Germany's rearmament programme and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter, it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars". With regard to the second defendant, the Tribunal stated: "Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced and there is no evidence that he was informed about the decisions reached there". As to the third defendant, the Tribunal suggested the possibility of inferring knowledge by virtue of a person's position: "The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be inferred from the positions he held". Ibid., pp. 135, 137 and 164.

responsibility. The Charter and the Judgement of the Nürnberg Tribunal are the main sources of authority with regard to individual criminal responsibility for acts of aggression.

(6) Several phases of aggression are listed in article 16. These are: the order to commit aggression, and, subsequently, the planning, preparation, initiation and waging of the resulting operations. These different phases are not watertight. Participation in a single phase of aggression is enough to give rise to criminal responsibility.